In the

Supreme Court of the United States

October Term, 1972

No. [redacted]

MARK ALLEN, ET AL., *Petitioners*,

v.

MILLICENT F. BROWN, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States:

Petitioners respectfully pray a reversal of so much of the ruling of the United States Court of Appeals for the Fourth Circuit as affirms that portion of the opinion of the United States District Court for the Eastern District of South Carolina, which holds that this Court's decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), forecloses all federal courts as a matter of law from considering any evidence of ethnic differences in the natural learning patterns of white and negro children.

Opinions Below

The opinion of the District Court is reported *sub nom. Millicent F. Brown, et al., v. School District No. 20, Charleston, South Carolina, et al., and Mark Allen, et al.*, at 226 F. Supp. 819 (App. p. 1), the portion complained of on this petition appearing at the end of page 825 and the head of page 826 (App. pp. 12-13).

The opinion of the Court of Appeals affirming the District Court is reported at 328 F. 2d 618 (App. p. 20).

The order of the Court of Appeals denying petitioners' application for rehearing (App. p. 22) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was dated and entered January 27, 1964.

The order of the Court of Appeals denying petitioners' petition for rehearing was dated and entered March 13, 1964.

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code (28 U.S.C. §1254).

Question Presented

Is a State forbidden by the Equal Protection clause from reasonably classifying its children in schools on the basis of their educational aptitudes because the difference in aptitude is also a racial characteristic?

Statute Involved

Constitution of the United States, Amendment XIV:

> "Section 1 . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This is an action praying the desegregation of the schools of Charleston, South Carolina, and the substitution of a "unitary non-racial system" in its place. Respondents were plaintiffs below and represent all negro students in such schools. Petitioners were intervenors in the trial court and represent all white students in such schools. Petitioners, as intervenors, pleaded that the members of the two groups represented by petitioners and by respondents so differed in various phases of educability that unless separate curricula adapted to their different aptitudes and learning patterns were used, both would suffer educationally and psychologically.

The trial court reserved its ruling on respondents' objections and allowed petitioners to introduce into evidence professional studies and the testimony of scientists in the fields of biology, anthropology, sociology and psychology on these issues. Respondents did not contradict the evidence or question the qualifications of the witnesses. For the purposes of this application, therefore, respondents concede the truth of the following evidence.

It was shown that over the past fifty years more than a hundred varied tests, measured against national norms, have been made of large groups of negro and white school children in all parts of the United States and in other countries; that a number of these studies used ethnically diverse subjects who had been matched for intelligence, for economic condition and for cultural background; that

the results of all such tests without exception showed one or more of the following characteristic educability differences to exist between the two groups—and to the same extent whether matched or unmatched:

> First, the two groups differ sharply in the type of subject and type of teaching to which they respond most readily. The widest differences occur in mathematical abstraction and reading comprehension, while the smallest differences occur in subjects more largely based on memorization.
>
> Second, the natural growth rates of learning ability differ by one year for every four, such that while the average difference is about half a year on entering first grade, it increases to three and a half years by the twelfth grade, and the change is independent of the nature of the school or the child's background.
>
> Third, as a result there is an increasing difference between the two groups in average mental age (currently defined as mental maturity or psychometric intelligence and measured by a figure known as I.Q.) which in mature individuals in school approximates twenty I.Q. points.

It was further shown that the separate schools of Charleston had over the years become adapted to the differing teaching pace and subject requirements of the children of both races, that ten to twenty times as high a percentage of negro graduates of such separate high schools qualified at the minimal levels of the College Entrance Examination Boards tests as did the corresponding graduates from mixed schools in the North, that on comparison with the same group such Southern graduates received higher college marks and had greater educational motivation in interracial colleges, and that negro children taught in sepa-

rate schools had greater racial self-identification with a resultant increase in self-assurance and personality stability.

Developments in the science of social dynamics in the past ten years were related to the effect that the process of learning is, to a major extent, a function of the learning environment which is at its optimum when there is mutual self-identification between the students in the learning group and between them and a teacher who can only in this way establish the substitute parental relation which is essential to the degree of classroom discipline required for effective instruction.

Finally, intervenors proved that these differences in aptitude and class response are of ethnic rather than environmental origin, the product of separate evolutionary development related to existing physical variations between the two races; that these differences were not subject to elimination by any change of schooling or economic background; and that any compulsory congregation of two such groups under a uniform curriculum as requested by respondents would substantially destroy the existing levels of instruction in the Charleston schools and would cause severe and permanent educational and psychological injury to both negro and white school children.

The District Court refused to consider or make findings on this evidence, holding, in the only portion of the ruling here appealed from:

> "The defendants by their answer and the intervenors by similar allegations contend: 'that there are differences and disparities between the ethnic group allegedly represented by plaintiffs (Negro children) and that represented by petitioners (white children) as to form a rational basis for separating such ethnic groups in the schools of Charleston.'

"In Brown v. Board of Education, 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L. Ed. 873, the United States Supreme Court held:

> 'We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.'

> "The position taken by the defendants and the intervenors in effect, asks this Court (a U.S. District Court) to overrule the United States Supreme Court, the Fourth Circuit Court of Appeals and all the numerous decisions by those courts, reiterating, expanding and amplifying the holdings of the United States Supreme Court in Brown v. Board of Education (supra). Under the doctrine of *stare decisis* this Court has no such authority." (App. pp. 12-3).

The Court of Appeals made no reference to the point and adopted the District Court's opinion as its own (App. p. 20).

Accordingly, the sole question on this petition is whether the ruling of this Court in *Brown* v. *Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954), establishes as a rule of constitutional law the fact that there do not and cannot exist educationally significant ethnic differences in learning aptitudes and correlative educational requirements between children of different races.

Reasons Relied on for Allowance of Writ

This petition brings before this Court for the first time an aspect of the school desegregation cases never previously tried or appealed. In all legal history prior to 1954, the constitutionality of separate schools for white and negro children was based upon decisions—including those of this Court—which assumed as a matter of judicial notice that a difference in educability existed between white and negro children. Although a great volume of published test results existed at that time which confirmed those assumptions, we find no case prior to 1954 which ever subjected the underlying factual inquiry to the test of the witness stand or which had made any effort to determine the scientific validity of the assumed differences, or whether the differences were individual rather than ethnic in character.

In the records of the cases which underlay this Court's decision in *Brown* no defendant appears to have made any substantial effort—possibly on the assumption that prior decisions did not require it—to contradict the assertions made therein by the witnesses for those petitioners that no such differences were shown in the existing literature and that separate schooling was psychologically injurious to the negro student. If indeed that evidence be correct, and in 1954 this Court had before it no other record, then the conclusion of this Court that separate schools for children of "similar age and qualifications" were inherently unequal and injurious to the members of the minority group is logically and legally unimpeachable.

If, to the contrary, there do exist significantly different educational patterns in the two groups, then every court order which compels pedagogical uniformity by requiring the compulsory intermixture of these students, deprives the members of one group of the type of school best fitted

to realize its educational potential or ends in a compromise to the injury of both.

Whatever the social origin and past history of the separate school systems of the South may have been, it is conceded today, even by respondents' experts, that the separate negro schools in Southern cities are not only producing a higher scholastic achievement level for Negroes, but are more effective in developing in them greater educational motivation and personal assurance. If the constitutionally acceptable purpose of schools is the education of children rather than a judicially enforceable demonstration of the political rights of their parents, an early determination of the truth or falsity of these propositions under the protective scrutiny of the rules of evidence and cross-examination is essential.

Other than this case, proof of ethnic differences in educability has been offered in only four cases. Two were tried and are now *sub judice* before district courts. The other two have been argued and are awaiting decision in the Fifth Circuit on appeals from decisions favoring the position of these petitioners. This is the first case ever to reach this Court on this question, an issue whose truth or falsity may determine for a generation or more the educational levels of our public schools and the American standard of literacy.

Summary of Argument

1. Questions of fact are matters as to which reasonable men can differ. The development of new scientific data requires a reconsideration of conclusions drawn from earlier evidence.

2. Evolutionary constitutional interpretation is often based on social and other scientific proof and when so

based is always open to a demonstration of later knowledge or prior omission of pertinent principle.

3. A true difference in learning pattern is a meaningful basis for reasonable classification in education, and where the differences shown are of ethnic origin, race or color is not in itself the basis of selection but is merely a "convenient index" to identify group members.

4. In *Brown* v. *Board of Education of Topeka*, this Court did not purport to foreclose all future inquiry as to the existence of such differences.

ARGUMENT

I

Whether Substantial Physiological or Mental Differences Exist Is a Question of Fact

The importance of factual inquiry in determining questions of constitutionality is illustrated by *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938). In an opinion upholding the validity of a Federal act which prohibited the shipment of filled milk in interstate commerce, this Court said (*id.*, 153):

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . , and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."

In *Grovey* v. *Townsend*, 295 U.S. 45 (1935), this Court ruled that the right to vote in a Texas primary was not a right guaranteed by the Constitution; then, nine years later in *Smith* v. *Allwright*, 321 U.S. 649 (1944), on a factual demonstration of the meaning of a primary election in a Southern state such as Louisiana, the Court reversed itself, saying of its earlier decision that it had "looked upon the denial of a vote in a primary as a *mere refusal* by a party of party membership" (*id.*, 660-1).

This principle requires that new, scientific data should always be admissible to evaluate earlier conclusions about the nature of society. In *Sweezy* v. *State of New Hampshire*, 354 U.S. 234 (1957), this Court departed from an earlier ruling to reverse a "subversive activities" conviction. As explained in the concurring opinion (*id.*, 261-2):

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true of the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible."

Among such areas of inquiry are the faculties, abilities and aptitudes of people. To illustrate this, let us take the three great constitutional equivalents in terms of non-discrimination: race, religion and sex. There appear to be no cases other than *Brown* itself in which the determination in this Court has turned upon the existence or non-existence of the physiological or psychological differences *between races* and the question would appear to be totally irrelevant in the context of religion. However, when we come to the third of these distinctions we find a number of decisions which are not only in point, but which develop the essentially factual nature of the inquiry required.

The Court of Appeals of the State of New York in *People v. Williams*, 189 N.Y. 131, 81 N.E. 778 (1907), invalidated as unconstitutional a state statute which prohibited night work for women in factories during specified hours. The court held that on the record before it there was nothing to show that an adult woman should not be "entitled to be placed upon an equality of rights with the man" *(id.*, 137).

This did not solve the underlying problem, which was in fact based upon the physiological differences between the sexes and the resultant necessity for difference of treatment in according them equal employment opportunity. Thus, eight years later, another attack was made upon a similar successor statute. In the second case the defense proved for the first time by scientific evidence that there was a difference between men and women such as to justify the application of different standards. In the later case, *People v. Charles Schweinler Press*, 214 N.Y. 395, 108 N.E. 639 (1915), *appeal dism.*, 242 U.S. 618 (1916), the Court of Appeals held that its former decision in *Williams* was necessarily limited to the facts of that record.

and that the failure to show the relevant differences between the two groups was the cause of the earlier decision.[1]

Distinguishing the *Williams* case, the court said (*id.*, 410-11):

> "But the facts on which the former statute might rest as a health regulation and the arguments made to us in behalf of its constitutionality were far different than those in the present case. . . . While theoretically we may have been able to take judicial notice of some of the facts, . . . actually very few of these facts were called to our attention."

The *Schweidler* case was commented upon in a Note, 28 Harv. L. Rev. 790 (1915), written by Mr. Justice Frankfurter, in which he stated (791):

> "First: Questions to the constitutionality of modern social legislation are substantially questions of fact. The formulae of the Bill of Rights do not furnish yardsticks by which the validity of specific statutes can be measured. Concepts like 'liberty' and 'due process' are too vague in themselves to solve issues. They derive meaning only if referred to adequate human facts. The legal principles cannot be employed *in vacuo*. . . . Deference to this data [on the relevant male-female differences by the Factory Investigating Committee] was the very foundation of the court's decision on the legal question.
>
> "Secondly, and closely following as a corollary, in

[1] In upholding the statute, the Court of Appeals specifically considered the problem offered by the exceptional case. It was "not a basis for a constitutional objection" to a statute like this "that in exceptional cases it may prevent employment of some women for a short time between those hours under such conditions as would be productive of no substantial harm" (214 N.Y. 395, 407).

asmuch as facts are dynamic, constitutional decisions upon which they must be based cannot be static. Conditions change, legislation deals with these changed conditions, and so must the courts. A book like Miss Goldmark's 'Fatigue and Efficiency' completely undermines prevalent assumptions as to facts and, thereby, may well destroy the very groundwork of prior judicial decisions. Therefore, the doctrine of *stare decisis* has no legitimate application to constitutional decisions where the court is presented with a new body of knowledge, largely non-existing at the time of its prior decision. This was precisely the situation in the *Schweinler* case. The seven years that elapsed between it and the *Williams* case developed an overwhelming mass of authoritative data, and it is by the light of such new knowledge that the justification of legislative action must be determined."

Mr. Justice Frankfurter referred to his earlier article with approval in *International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957), affirming an injunction against peaceful picketing, contrary to this Court's prior decision in *Thornhill v. Alabama*, 310 U.S. 88 (1940), saying (354 U.S. 284, 289):

> "Soon, however, the Court came to realize that the broad pronouncements, but not the specific holding, of *Thornhill* had to yield 'to the impact of facts unforeseen,' or at least not sufficiently appreciated."

Just as the *Schweinler* case, *supra*, overruled the presumption that women were all "equal" to men, on which the earlier *Williams* decision had been based, so in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), this Court upheld the constitutionality of a Washington State law fixing minimum wages for women and minors and overruled

its prior ruling in *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), which had held the D. C. Minimum Wage Act invalid under the equivalent portion of the Fifth Amendment.

In its "re-examination of the *Adkins* Case," the Court took note of (p. 390) "the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered" and emphasized that reasonable classification was to be governed by "woman's physical structure" quoting (p. 394) *Müller* v. *Oregon*, 208 U.S. 412 (1908), as showing the constitutional authority of a state to limit working hours of women on the basis of differences between the sexes.

Nor is difference of physical structure alone the basis for such classifications. Mental differences are equally valid. In *Jacobson* v. *Lenhart*, ——, Ill. ——, 195 N.E. 2d 638 (1964), it was recently held that a difference in mental maturity considerably less than that shown in this record was a sufficient ground for a state to constitutionally discriminate between men and women in setting differing periods of limitation of actions.

Mr. Justice Sutherland, in *United States* v. *Provident Trust Company*, 291 U.S. 272 (1934), held that such scientific evidence of human differences must be permitted to overturn even a conclusive legal presumption, in that case the question of the possibility of further issue to a life tenant. This reference to scientifically shown human differences has also been used to permit blood tests to overcome one of the strongest of legal presumptions—paternity of the husband. *Beach* v. *Beach*, 114 F. 2d 479 (D.C. Cir. 1940).

If factual inquiry is the key to constitutional application, then certainly scientific evidence of ethnic differences is an appropriate judicial issue. The Ninth Circuit, in *Farrington* v. *Tokushige, et al.*, 11 F. 2d 710 (1927),

judicially observed that obvious ethnic differences existed between Japanese and Caucasian citizens in Hawaii. Such differences are the only constitutional justification for the numerous statutes still in effect which distinguish between American Indians and members of other races. Mr. Justice Douglas in his writings has similarly commented upon the possibility of regulations based on the special traits of Indians and Eskimos. Obviously not every difference in trait between races has educational significance, but just as clearly some may have. Differences which control the rate and type of learning, the nature of the teaching process and the selection of subject are evidently of educational meaning and are facts capable of proof or disproof.

That such matters may be of a complex scientific nature and lie within the field of the social sciences do not change their nature as facts and therefore do not eliminate the necessity for proof as a basis for judicial action.

> "Social and behavioral scientists and lawyers have long recognized that the law is concerned with, and is also in turn very deeply affecting, concepts of behavior and of society which these sciences are in the process of investigating. Consequently there have been from time to time attempts not only to incorporate the attitudes of science in certain areas but, what is more, to adopt the findings of scientists. . . . In fact, since law in the end always deals with human beings, there would seem to be almost no area in which the influence and the findings of the social and behavioral sciences might not be used to explain and improve the law in its daily operation upon the members of our society.
>
> "Some progress has been made in the acceptance of this point of view by lawyers. For example, we are used to seeing the trained social service worker or probation officer in and around the courts. In anti-trust actions, not only the government but also the

corporations under attack employ the factual findings and the arguments of economics as a major part of their cases. When the United States Supreme Court reversed a long-standing position on segregation of the races, it relied in part upon evidence drawn from areas such as education and sociology. [Brown v. Board of Educ., 349 U.S. 294 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954)]. Many other examples could be cited to show that in fact there has been considerable acceptance of the techniques and conclusions of all the areas of inquiry we group under the heading of Social and Behavioral Science." (Fahr, S. M. and Ojemann, R.H., *The Use of Social Behavior Science Knowledge in Law*, 48 Iowa L. Rev. 59 (1962).

Similarly, although a recent report of a special committee of the American Association for the Advancement of Science stated the opinion of the scientists involved that the relative educability of white and negro students was legally irrelevant to the issue of school segregation (*Science and the Race Problem* in Science, November 1 1963, p. 558), nevertheless it recognized the essentially factual nature and present lack of knowledge of educationally related ethnic differences (*id.*, 558):

> "These allegations confront the scientific community with an unavoidable challenge, for in our view all scientists bear a responsibility toward the proper social application of scientific knowledge and have the duty to resist the corrosive effects of social and political pressures on the integrity of science. It is essential, therefore, that we determine whether these claims are valid, and, whether valid or not, what their significance is to the scientific community and to the public."

Petitioners respectfully submit that it is at least equally important to determine what the significance of these facts is to the law since present resolution of the question is needed if further constitutionally directed social evolution is to be based upon pragmatic reality rather than upon emotional presupposition.

As such questions of fact, the District Court and the Court of Appeals were clearly in error to rely on the doctrine of *stare decisis*, which is solely concerned with principles of law.

> "The doctrine of stare decisis . . . relates only to questions of law." Freeman, A. C., *A Treatise on the Law of Judgments*, Vol. 2, p. 1329 (5th ed., 1925).

II

A State May Reasonably Classify Groups of Citizens Upon the Basis of Substantial and Relevant Differences Between Them.

The broad principles of reasonable classification have been laid down by this Court over the years and are a substantial and fundamental part of our constitutional law. As said in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 147, (1940):

> "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

In *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), the court detailed the basis for such classifications under the Equal Protection clause, quoted with approval in *Morey* v. *Doud*, 354 U.S. 457, 463-4 (1957):

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power

to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369."

In *McGowan v. Maryland*, 366 U.S. 420, (1961), this Court said (425-6):

"The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived

to justify it. See Kotch v. Board of River Port Pilot Com'rs., 330 U.S. 552, 67 S. Ct. 910 L. Ed. 1093; Metropolitan Casualty Ins. Co. of New York v. Brownell, 294 U.S. 580, 55 S. Ct. 538, 79 L. Ed. 1070; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369; Atchison, T. & S. F. R. Co. v. Matthews, 174 U.S. 96, 19 S. Ct. 609, 43 L. Ed. 909."

It is hornbook law that education is primarily a problem for the individual states. Barring unconstitutional discrimination, the state has the obligation and the correlative authority to determine the location of school districts, the level of study, the scholastic norm, the textual content, the various pedagogical theories which will govern the educational progress, whether education will be compulsory or voluntary, and for what period, and the amount of money which will be budgeted for it. Such responsibility extends even into the peripheral area of personal associations affecting study: *Pugatte* v. *Board of Regents*, 102 F. Supp. 407 (W. D. Okla. 1951), *affirmed without opinion*, 342 U.S. 936 (1952) (supervision of student housing arrangements); *Waugh* v. *Board of Trustees*, 237 U.S. 589 (1915) (prohibition of Greek letter fraternities); *Webb* v. *State University*, 125 F. Supp. 940 (N. D. New York 1954), *appeal dismissed*, 348 U.S. 867 (1954) (outlawing fraternities and sororities).

In exercising this authority, what limit is set on the States in terms of racial characteristics? The problem of using race and color as a basis of classification is illustrated by *Hernandez* v. *Texas*, 347 U.S. 475 (1954), which refers to the necessity of ascertaining facts as a prerequisite for the determination of the question of reasonableness of classification. Mr. Chief Justice Warren, after

pointing out that race and color may serve as a convenient index for differentiating between groups, said (*id.*, 478):

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out that class for different treatment *not based on some reasonable classification*, the guarantees of the Constitution have been violated." (Emphasis added)

Similarly, the Court of Appeals for the Fifth Circuit, noting the absence of any relevant criteria for racial separation in *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957), specifically called attention to the lack of evidence of "any reasonable classification of students according to their proficiency or health. . . ."

To the same general effect is the statement of this Court in *Bolling* v. *Sharpe*, decided the same day as *Brown*, where the Court said, with respect to a classification of children into separate schools by race in the District of Columbia (347 U.S. 497, 499 [1954]):

> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."

Clearly a classification which can be "scrutinized with particular care" is not a classification which is invalid *per se*. Petitioners have no objection to such scrutiny—on the contrary, it was the refusal below to scrutinize the proposed classification which has led to this application.

III

This Court's Decision in Brown vs. Board of Education Supports the Present Application

In *Brown* this Court defined the underlying inquiry thus (347 U.S. 483, 493):

> "We come then to the question presented: Does segregation of children in public schools *solely* on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" (Emphasis added)

Although it would appear sufficiently clear on its face that this calls for a review of the facts rather than of law, we are confirmed when we find the Court looked to the testimonial and other evidence in the records before it and to a "Brandeis" submission of scientific opinion submitted by agreement and limited the decision to the separation of children "of similar age and qualification" (494).

From the Kansas record, this Court read (*id.*, 494):

> ". . . . the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

These statements involve on their face most complex questions of sociology and psychology, the "interpenetrating aspects of holistic perplexities" of *Sweezy*. Whether negro children in Kansas felt that separate schooling de-

noted inferiority, whether such a sense of inferiority existed and affected their motivation to learn, and thus whether their motivation to learn was increased or diminished by segregation, were questions which could only be referred to scientific studies for resolution. And when this Court further said that the above-quoted finding of injury through segregation "is amply supported by modern authority" (347 U.S. 483, 494, n. 11), the Court clearly rested its ruling on record expressions of non-judicial expert opinion.

It seems patently absurd to assume that this Court in *Brown* was trying to set limits for all time to the extent of modern psychological knowledge. Yet it could only be by such an assumption that the District Court and Court of Appeals could have denied as a matter of law any further inquiry into the current state of that knowledge.

This conclusion is sustained in finding that every district court which has considered the nature of this Court's decision in *Brown* has stated it to be based on facts contained in the four underlying case records. *Stell* v. *Savannah-Chatham Cty. Bd. of Ed.*, 220 F. Supp. 667 (S.D. Ga. 1963); *Taylor* v. *Board of Education of New Rochelle*, 191 F. Supp. 181 (S.D.N.Y. 1961), *cert. den.*, 368 U.S. 940 (1961); *Calhoun* v. *Board of Education of Atlanta*, 188 F. Supp. 401, 409 (N.D. Ga. 1959); *Frasier* v. *Board of Trustees of N. C. Univ.*, 134 F. Supp. 589, 592 (M.D.N.C. 1955), *affirmed per curiam*, 350 U.S. 979 (1956).

Conclusion

Petitioners submit that if it can be shown that a true distinction exists between these two groups of children, such that separate teaching in the Charleston schools would substantially improve the education of both, then such evidence would not only be admissible but would be an essential prerequisite to the issuance of a proper decree in

equity intended to afford "equal educational opportunities" to the classes represented both by petitioners and respondents.

Petitioners pray this Court to reverse and remand the case to the District Court with instructions to consider petitioners' evidence tending to show that the relief demanded by respondents would be educationally and psychologically harmful to the children involved.

Respectfully submitted.

/s/ Geo. Stephen Leonard.

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MILLICENT F. BROWN et al., *Plaintiffs*,

v.

SCHOOL DISTRICT NO. 20, CHARLESTON, SOUTH CAROLINA et al., *Defendants*, and MARK ALLEN, et al., *Intervenors*.

Civ. A. No. 7747

United States District Court, E. D. South Carolina, Charleston Division

August 22, 1963

MARTIN, *District Judge*.

This action was brought by thirteen[1] Negro children and their parents on behalf of themselves and others similarly situated for an injunction enjoining the operation of the school system of School District Number 20 in Charleston County, South Carolina, on a racially segregated basis. Plaintiffs seek an order of this Court requiring that the plaintiffs here be allowed to enroll in the white school of their choice; requiring the School Board to submit a plan calling for the abolition of a dual school system; for an order requiring the complete integration of school personnel and for costs.

Plaintiffs invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1343 (3), 42 U.S.C. § 1983.

After the pleadings were complete, several white students and their parents moved the Court for permission to intervene in this action. This motion was granted and they were permitted to participate in the hearing and filed extensive briefs thereafter.

The cause was heard at Columbia, South Carolina, on August 5, 1963.

[1] Subsequent to filing, two infant plaintiffs, Valerie Wright and Henderson Alexander, have ceased to attend the school system operated by defendants.

School District Number 20 is composed of the City of Charleston.[2] The school system is completely segregated and operates a total of fifteen schools, six for white children and nine for Negro children. Areas served by each school are established so that a dual set of attendance area lines exist; white children live in the zones of Negro schools but attend white schools. Negro children live in zones of white schools but attend Negro schools. When the white elementary school (Mitchell) was closed, (end of school year 1963) all of its former pupils living on one side of a line bisecting its zone were assigned to one of the other two white schools and all other former pupils living on the opposite side of the dividing line were assigned to another white school by the direction of the Superintendent of Schools. The total population of the District is 65,925—made up of 32,313 whites and 33,612 Negroes. There are a total of 12,647 students—9,539 Negroes and 3,108 whites. 420 teachers are employed—286 Negroes and 134 whites.

There have been no formal applications filed by Negro children to enter white schools at the first grade level. All the plaintiffs herein have made application to transfer from a Negro school to a white school.

The applications of the various plaintiffs were considered by the Board and all were rejected. Applications for transfer from one school in School District Number 20 to another are governed by rules adopted by the Board of Trustees of the District on the 10th day of June 1959. These rules prescribe the procedure for filing an application for transfer and the procedure to be followed when an application has been denied. Three of the plaintiffs, Brown, Hines and Dawson, have exhausted the administrative remedies provided for by the rules of the Board. Their applications for transfer to a white school were denied by the Board for the reason, that, the Board concluded, it was for the children's best interest to remain in the Negro schools they were presently enrolled in and attending. The other plaintiffs have not exhausted such remedies but allege that the remedies are inadequate to provide the relief sought.

[2] Old City of Charleston prior to recent annexation.

The defendants contend, that the plaintiffs have no standing in this Court, until all administrative remedies are exhausted and therefore this action should be dismissed as to those plaintiffs who have failed to exhaust administrative remedies. The defendants further contend, that there is no evidence of racial discrimination present in the rejection of the applications of the plaintiffs who have exhausted their administrative remedies and, that any racial separation in the public schools of District Number 20 is voluntary and therefore offends no constitutional principle.

The primary questions presented, therefore, are the justification of the School Board's denial of that group of applications which were denied on their merits; and the remaining applications which were denied because of that group's failure to exhaust administrative remedies.

The rules promulgated by the Board of Trustees of Charleston School District Number 20 and the South Carolina Statutory Law, known as the South Carolina Pupil Assignment Law; 21-247 et seq., South Carolina Code of Laws (1962), are the authority by which the School Board attempts to justify the denial of both groups of petitions. This same position was taken by the School Board in the case of Jeffers v. Whitley, 309 F.2d 621 (4th Cir. 1962). The overall factual situation in the instant case is analogous to that presented in the Jeffers case. By a Per Curiam opinion, the Fourth Circuit sitting en banc in the Jeffers case held:

> "Racial segregation in the schools was required by the Constitution of North Carolina until 1954 when the Supreme Court held similar requirements invalid under the Fourteenth Amendment. Since then, the School Board of Caswell County has routinely assigned each pupil to the school he attended the previous year. This practice, in conjunction with invariable denial of transfer applications, perpetuated the old system with no opportunity for escape by any pupil enrolled in the schools in 1954.
>
> "Since 1954, all first grade pupils have been segre-

gated by race. The School Board contends, however, that the assignments of such pupils have been voluntary. It has routinely assigned all first grade pupils to the schools where they attended a preschool clinic, but, the Board says, the parents could select the school to which the child was taken for enrollment in the preschool clinic, their choice being limited only by the availability of transportation facilities.

We need not consider whether freedom of choice at the first grade level, without any right of choice thereafter, would be a sufficient interim step toward establishment of a constitutionally permissible, voluntary system, for the record does not establish the factual premise. The record refers to no resolution of the Board establishing a right of choice at the time of enrollment in the preschool clinics. No such right of choice was mentioned in the pleadings of the Board in this action. The District Court has not found that the Board adopted any such policy or intended to confer any such right of choice. Indeed, the record indicates that the principal of each school controlled preschool clinic enrollments at that school. More importantly, there is no evidence that any such policy, if ever adopted, had been announced, or made known, to the people of Caswell County. Since the schools had been operated on a completely segregated basis, parents of preschool children cannot be said to have any freedom of choice until there has been some announcement that such a right exists.

. . . . . .

"The principal questions, therefore, go to the justification of the School Board's denial of the Brown applications on their merits and of the Jeffers applications because of their failure to exhaust administrative remedies in 1960.

"The School Board takes shelter behind the North Carolina Pupil Enrollment Act.

"We have held that Act to be constitutional upon its face.[3] We have held that rights derived from the Fourteenth Amendment are individual and are to be individually asserted in the Federal Courts, but only after exhaustion of reasonable administrative remedies provided by the state. We have required exhaustion of administrative remedies though the School Board had initiated no abandonment of discriminatory practices which antedated the 1954 School Cases.

"Those principles, firmly established in this circuit, do not support the position of the School Board, or warrant denial of all judicial relief except to the two Saunders children. They presuppose a fair and lawful conduct of administrative procedures. They are premised upon an expectation that administrators will take appropriate steps to relieve victims of discrimination, when an unwanted assignment is shown administratively to have been discriminatory. Until there has been a failure of the administrative process, it should be assumed in a federal court that state officials will obey the law when their official action is properly invoked. When, however, administrators have displayed a firm purpose to circumvent the law, when they have consistently employed the administrative processes to frustrate enjoyment of legal rights, there is no longer room for indulgence of an assumption that the administrative proceedings provide an appropriate method by which recognition and enforcement of those rights may be obtained.

"The School Board here has turned to the North Carolina Pupil Enrollment Act only when dealing with interracial transfer requests. It has not followed that Act in making original assignments. Assignments on a racial basis are neither authorized nor contemplated by that permissive Act. The only possible justification for a system of racial assignments, as practiced in

[3] The South Carolina Act is patterned after the North Carolina Act which was held to be constitutional on its face. See Carson v. Warlick, 4 Cir., 238 F.2d 724.

Caswell County, is the volition of the pupils and their parents.

"Though a voluntary separation of the races in schools is uncondemned by any provision of the Constitution, its legality is dependent upon the volition of each of the pupils. If a reasonable attempt to exercise a pupil's individual volition is thwarted by official coercion or compulsion, the organization of the schools, to that extent, comes into plain conflict with the constitutional requirement. A voluntary system is no longer voluntary when it becomes compulsive.

"This is not to say that when a pupil is assigned to a school in accordance with his wish, he must be transferred immediately if his wishes change in the middle of a school year. It does not mean that alternatives may not be limited if one school is overcrowded while others are not, or that special public transportation must be provided to accommodate every pupil's wish. It does mean that if a voluntary system is to justify its name, it must, at reasonable intervals, offer to the pupils reasonable alternatives, so that, generally, those who wish to do so, may attend a school with members of the other race.

"Caswell County's administration of her schools has been obviously compulsive. The invariable denial of interracial transfer requests cannot be squared with any freedom of choice on the part of the applicants. There can be no freedom of choice if its exercise is conditioned upon exhaustion of administrative remedies which, as administered, are unnegotiable obstacle courses. Freedom of choice is not accorded if the choice of the individual may be disregarded unless he can prove, by a preponderance of the evidence, that, 'under some other system never adopted nor practiced by the School Board, he would have been assigned to the school of his choice. Freedom of choice is a vapid notion, if its attempted exercise may be branded, condemned and ignored as racially motivated.

"Administrative remedies, such as those afforded by North Carolina's Pupil Enrollment Act, have a

place in a voluntary system of racial separation. If the system in operation was truly voluntary, if, generally, interracial transfers were to be had for the asking, a school official might still deny a particular request upon grounds thought not to undermine the voluntary nature of the system. In that event, it would be appropriate for the state to provide the applicant effective means of administrative review, and failure to pursue an adequate administrative remedy might foreclose judicial intervention. When the administrative processes, however, are used solely to prevent all freedom of choice in a system dependent for its legality upon the volition of its pupils, the remedy is both inadequate and discriminatory.

"In other circumstances, when an administrative remedy respecting school assignments and transfers, however fair upon its face, has, in practice, been employed principally as a means of perpetuation of discrimination and of denial of constitutionally protected rights, we have consistently held it inadequate. A remedy, so administered, need not be exhausted or pursued before resort to the courts for enforcement of the protected rights.

"In the light of these principles, the District Court was clearly correct in concluding that the transfer applications the Saunders children should have been granted. The same conclusion was required with respect to the Brown and Jeffers applications. Those children had withdrawn their consent, if they ever had consented, to their assignment, because of their race, to Caswell County Training School. They were legally entitled to attend the school of their choice, under an assignment system having no legal justification except by their consent, unless administrative considerations dictated some other alternative, and nothing of the sort is suggested. The remoteness from the Brown residence of the route of the Bartlett Yancey bus is not such a reason, for, concededly, the Brown children could ride the Training School bus and walk the short distance from that school to Bartlett Yancey. The fail-

ure of the Jeffers children to exhaust the administrative remedy is an irrelevance, for, as we have held, that remedy, as administered, was inadequate and discriminatory.

"We think general injunctive relief is also required.

"While rights derived from the Constitution are individual and are to be individually asserted, the record shows a general disregard by the School Board of the constitutional rights of Negro pupils who do not wish to attend schools populated exclusively by members of their race. Some of the plaintiffs exhausted administrative remedies, and in this action they have sought relief for others similarly situated as well as for themselves. Upon a proper showing, such relief is available in a spurious class action, such as this.

"Since the School Board has been obstinate in refusing to recognize the constitutional rights of Negro applicants, this case should not be closed on a basis which would leave the Board free to ignore the rights of other applicants, until, after long and expensive litigation, they were judicially declared. The duty to recognize the constitutional rights of pupils in the Caswell County Schools rests primarily upon the School Board. There it should be placed by an appropriate order of the court, for the District Court has a secondary duty of enforcement of individual right and of supervision of the steps taken by the School Board to bring itself within the requirements of the law.

"In these circumstances, the duty of the court, as a court of equity, is traditionally discharged through injunctive orders.

"We conclude, therefore, that the appellants, the Brown and Jeffers children, as well as the appellants, Saunders, are entitled to individual relief. This may be done by an order comparable to that of the District Court respecting the Saunders children. The District Court ordered their admission to the school of their choice if they should present themselves there for enrollment. The order similarly should require the

School Board to enroll the Brown and Jeffers children in Bartlett Yancey, provided only, as to each of them, that he presents himself there for enrollment at the commencement of any semester.

"On behalf of others, similarly situated, the appellants are not entitled to an order requiring the School Board to effect a general intermixture of the races in the schools. They are entitled to an order enjoining the School Board from refusing admission to any school of any pupil because of the pupil's race. So long as the School Board follows its practice of racial assignments, the injunctive order should require that it freely and readily grant all requests for transfer or initial assignment to a school attended solely or largely by pupils of the other race. The order should prohibit the School Board's conditioning its grant of any such requested transfer upon the applicant's submission to futile, burdensome or discriminatory administrative procedures. The order should further provide that, if the School Board does not adopt some other nondiscriminatory plan, it shall inform pupils and their parents that there is a right of free choice at the time of initial assignment and at such reasonable intervals thereafter as may be determined by the Board with the approval of the District Court. How and when such information shall be disseminated may be determined by the District Court after receiving the suggestions of the parties.

"The injunctive order may provide for its modification upon application of the School Board to the extent that modification may be required to enable the Board to solve and eliminate any administrative difficulty that may arise. It may contain other provisions not inconsistent with this opinion.

"The injunctive order should remain in effect until the School Board, if it elects to do so, presents and, with the approval of the District Court, adopts some other plan for the elimination of racial discrimination in the operation of the schools of Caswell County.

"The District Court should retain jurisdiction of the

action for further proceedings and the entry of such further orders as are not inconsistent with this opinion."

In Bell v. School Board of Powhatan County, 321 F.2d 494 (4th Cir. 1963).

"... ... The School Board argues that whatever segregation exists must be deemed voluntary until a valid transfer application is filed. They look for support to the state court decision declaring that it was not their duty to conduct any investigations, and that the applications were void and should be disregarded. We, however, hold that the entire record, including the filing of these applications and of the present complaint itself, amply demonstrate the involuntary character of segregation in the Powhatan schools. Moreover, the continued practice of initially assigning all students by race shows that the School Board is actively engaged in perpetuating segregation. See Jeffers v. Whitley, 309 F.2d 621, (4th Cir. 1962)."

In Green v. School Board of the City of Roanoke, 304 F.2d 118 (4th Cir. 1962).

"... ... The pupil assignment system in effect in the City of Roanoke, as administered by the joint efforts of the local school authorities and the state Pupil Placement Board, is, as demonstrated by the facts, infected throughout with racially discriminatory applications of assignment criteria.

"All initial assignments of children enrolling in the city's school system are on a completely racial basis. Every white child is initially assigned to a school in a section other than Section II, regardless of how near he might reside to a section II school. Every Negro child, on the other hand, is initially assigned to a section II school, regardless of his place of residence or any other criteria. The Negro child, if he desires a desegregated education, must thereafter run the gauntlet of numerous transfer criteria in order to extricate

himself, if he can, from the section II schools. These are hurdles to which a white child, living in the same area as the Negro and having the same scholastic aptitude, would not be subjected, for he would have been initially assigned to the school to which the Negro seeks admission. In Jones, vs. School Board of City of Alexandria, Virginia, 278 F.2d 72, 77 (4th Cir., 1960), this practice was expressly condemned:

> "* * * * if the criteria are, in the future, applied only to applications for transfer and not to applications for initial enrollment by children not previously attending the city's school system, then such action would also be subject to attack on constitutional grounds, for by reason of the existing segregation pattern it will be Negro children, primarily, who seek transfers."

"Or, as we stated in Hill v. School Board of City of Norfolk, Virginia, 282 F.2d 473, 475 (4th Cir., 1960), where

> "* * * * assignments to the first grade in the primary schools are still on a racial basis, and a pupil thus assigned to the first grade still is being required to remain in the school to which he is assigned, unless, on an individual application, he is reassigned on the basis of the criteria which are not then applied to other pupils who do not seek transfers * * *, such an arrangement does not meet the requirements of the law."

> "Steps must be taken to end this unlawful initial assignment arrangement which the record discloses to exist in the City of Roanoke. It is a racially discriminatory application of assignment criteria to which all of the appellants were subjected."

In addition to the decisions of the Fourth Circuit, holding that Negro children need not comply with administrative procedures prior to instituting suit in the federal courts when the school system is operated on a racially

segregated basis, the United States Supreme Court in McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622, has put beyond debate the proposition that, in a school desegregation case, it is not necessary to exhaust state administrative remedies before seeking relief in the federal courts.

The Court said:

> "[As] We [have] stated in Monroe v. Pape, 365 U.S. 167, 183 [81 S.Ct. 473, 5 L.Ed.2d 492]:
>
> "'It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.'
>
> "The cause of action alleged here is pleaded in terms of * * * 42 U.S.C. 1983 * * *
>
> "* * * That is the statute that was involved in Monroe v. Pape, * * * and we reviewed its history at length in that case. * * * The purposes were several fold to override certain kinds of state laws, to provide a remedy where state law was inadequate, "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" (id., 174), and to provide a remedy in the federal courts supplementary to any remedy any State might have."

The defendants by their answer and the intervenors by similar allegations contend: "that there are differences and disparities between the ethnic group allegedly represented by plaintiffs (Negro children) and that represented by petitioners (white children) as to form a rational basis for separating such ethnic groups in the schools of Charleston.

In Brown v. Board of Education, 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L.Ed. 873, the United States Supreme Court held:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Sepa

> rate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

The position taken by the defendants and the intervenors in effect, asks this Court (a U.S. District Court) to overrule the United States Supreme Court, the Fourth Circuit Court of Appeals and all the numerous decisions by those courts, reiterating, expanding and amplifying the holdings of the United States Supreme Court in Brown v. Board of Education (supra). Under the doctrine of *stare decisis* this Court has no such authority.

By a unanimous opinion filed, May 27, 1963, the United States Supreme Court in Watson v. City of Memphis, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529, said:

> "It is now more than nine years since the Court held in the first Brown decision, Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, that racial segregation in state public schools violates the Equal Protection Clause of the Fourteenth Amendment."
>
> * * * Given the extended time which has elapsed, it is far from clear that the mandate of the second Brown decision, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, requiring that desegregation proceed with all deliberate speed would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. Brown never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools, let alone other public facilities not involving the same physical problems of comparable complexity."

The holdings of the United States Supreme Court and the Fourth Circuit Court of Appeals in the cases hereinabove referred to dictate to this court the decision that

must follow in the light of the existing factual situation surrounding the operation of School District Number 20.

Findings of Fact

1. This school system is completely segregated, white children attending those schools operated for whites and Negro children attending only those schools operated for Negroes.

2. A dual set of attendance area lines exist, with white children living in the zones of Negro schools and Negro children living in the zones of white schools.

3. No formal application has been made by any Negro child to enter a white school at the first grade level; all of the plaintiffs herein have made formal applications to transfer from a Negro school to a white school.

4. All applications have been denied by the Board: (except Brown, Hines and Dawson because it was for the applicants' best interest; the Glover, E. Alexander, Clarence Alexander, Cassandra Alexander, G. Alexander, J. Ford, B. Ford and G. Ford because they had not complied with and exhausted their administrative remedies.

5. That the applicants of the second group, as set out in 4(e) above, would have been denied by the Board had they exhausted their administrative remedies.

6. That the rules and regulations of the Board are inadequate, since they fail to establish a right of choice, to a child or his parents, at the time of enrollment and the announcement of such right of choice made known to the parents of preschool children.

7. That any consent on the part of the plaintiffs or their parents that might have been inferred, prior to the filing of their applications to transfer and the bringing of this action, is clearly refuted and the denial of their applications for transfer to white schools amounts to involuntary segregation.

8. The plaintiffs' applications for transfer are the only ones to which the Board's Rules governing transfer and

the South Carolina law governing pupil assignment, have been applied.

9. Neither the Board Rules or the South Carolina Pupil Assignment Law is applied by the Board when enrolling pupils at the first grade level.

10. That the school year for School District Number 20 begins in September 1963 and runs to June 1964. There are no mid-term semester promotions or initial assignments of first grade pupils.

11. The authorities of School District Number 20 have taken no action to formulate any plan or procedure towards carrying out the mandate of the United States Supreme Court as announced in the second Brown decision and subsequent decisions of that Court and the Fourth Circuit Court of Appeals.

ORDER

1. It is ordered that the defendants herein and their agents, servants and employees, admit and enroll as students the Plaintiffs, Millicent F. Brown, Oveta Glover, Clarisse Karan Hines, Ralph Stoney Dawson, Eddie Alexander, Clarence Alexander, Cassandra Alexander, Gerald Alexander, Jacqueline Ford, Barbara Ford and Gale Ford at the white school, where a white child would normally attend, if he resided in the same school zone that each of plaintiffs respectively resides in, subject to the same terms and conditions as other students enrolled there, provided only, that these minor plaintiffs present themselves at said school for registration at the beginning of the new school term in September 1963.

2. It is further ordered that the defendants, their agents, servants and employees are hereby restrained and enjoined from refusing admission to the minor plaintiffs herein on the basis of race or color.

3. It is further ordered that due to the short period of time before the beginning of the 1963-64 school year, the uncertainty of the number of applicants that may desire

transfer to a different school than the one in which they are presently enrolled; the uncertainty of the number of first grade students who may desire to enroll in a school other than the one in which they would have been enrolled prior to this order; the administrative difficulties that would necessarily flow from such uncertainties; this Court, in the exercise of the discretion vested in it, holds that it would be impractical to require the Board to admit others, similarly situated to the plaintiffs herein, to schools other than those they are presently enrolled in or other than those that they would be initially enrolled in, under the dual system now in existence for the 1963-64 school year.

4. It is further ordered, however, that beginning with the school year 1964-65 the defendants and their agents, servants and employees are hereby restrained and enjoined from refusing admission, assignment or transfer of any other Negro child entitled to attend the schools under their supervision, management or control, on the basis of race or color.

5. It is further ordered that beginning with the school year 1964-65, the defendants and their agents, servants and employees are hereby restrained and enjoined from:

(a) Failing or refusing to freely and readily grant all requests by parents or guardians for the transfer or initial assignment of pupils to a school attended solely or largely by pupils of another race;

(b) Conditioning the grant of requests for transfers or initial assignments pursuant to paragraph 5. (a) above upon the applicants' submission to any futile, burdensome or discriminatory administrative procedures. This provision is intended to include, but is not limited to, prohibiting the use of such administrative procedures as standards for deciding such requests which are not generally and uniformly applied in assigning all pupils, and the requirement that pupils or parents attend administrative hearings, or submit to tests or other evaluations which are not uniformly applied in assigning pupils.

6. It is further ordered that the defendant, their agents, servants and employees shall inform the parents or guardians of all pupils presently attending school in School District Number 20, as well as all those who shall hereafter enroll in the said school system, of the right of all pupils to freely choose to attend a racially non-segregated school, in the following manner:

(a) The following notice or its equivalent shall be individually given in writing at the times prescribed in subparagraph 6(b) below to the parents or guardians of all pupils:

"Every child in School District Number 20 school system has the right to attend a school freely selected without regard to race or color. Parents' requests for initial assignment or transfer of pupils in order to attend a school with members of the other race will be freely granted. If your child is entering school for the first time, you may present the child for enrollment at any school serving the child's grade level without regard to whether the school you choose is or was formerly attended solely by Negro pupils or solely by white pupils. If your child is now assigned to an all-Negro or an all-white school, and you desire that the child be transferred to another school in order to obtain a desegregated education, you should indicate this desire on this notice in the space provided and return it to your child's present teacher or principal." The foregoing language is sufficient under this Order, but the school authorities may adopt such other language consistent with the purpose of the order as they may desire. The defendant school authorities may give this notice by regular United States mail or by any other means which will fairly insure that copies reach all parents concerned.

(b) The notices prescribed in subparagraph (a) above shall be given to the parents of every child presently enrolled in School District Number 20 system at

least ten (10) days before the end of the 1963-64 school year. The same notice shall be given to the parents of every child who is enrolled in School District Number 20 system at the end of the 1963-64 school year at least thirty (30) days before the beginning of the 1964-65 school year, and thereafter the notice shall be given to such persons at least thirty (30) days before the beginning of each school year, unless the defendants secure the approval of the Court to give the notice in some other manner. The same notice shall also be given to the parents of every child who shall enroll in School District Number 20 school system for the first time, whether such child is beginning school, has changed residence from another school, administrative unit or otherwise, at or prior to the time any such pupil is first assigned to or enrolled in a school in the system, at whatever time of the year this may occur.

7. The provisions of paragraphs 5 and 6 above of this Order are to remain in effect until the defendant school authorities present to this Court, and with its approval, adopt some other plan for the complete elimination of racial discrimination in the operation of the public schools in School District Number 20. When and if the defendants file such a desegregation plan with the Court, they shall serve copies upon plaintiffs' attorneys and the Court will schedule further hearings in order to judge the adequacy of such plan.

8. It is hereby provided that the School Board of District Number 20 may apply to this Court for any reasonable modification of this Order necessary to solve and eliminate any administrative difficulties that may arise hereunder.

9. It is further ordered that this Court retain jurisdiction of this cause for such further proceedings and entry of such further orders as are necessary and proper, including the questions of teacher qualifications and assignments as well as attorney's fees requested by plaintiffs.

10. It appearing, that some of the named defendants

are no longer serving in the capacity of officials of School District Number 20; it is, therefore, ordered, that their successors in office, not originally named as defendants in this action, are substituted as defendants herein for their predecessors in public office. Counsel for the defendants are directed to make known to the United States Marshal, the names of the present School Officials of School District Number 20, in order that a copy of this Order may be served upon each, personally, by the Marshal.

MILLICENT F. BROWN, et al., *Plaintiffs-Appellees*,

v.

SCHOOL DISTRICT No. 20, Charleston, South Carolina, et al., *Defendants*, and MARK ALLEN, et al., *Intervenors-Appellants*.

No. 9216

United States Court of Appeals, Fourth Circuit

Argued Jan. 20, 1964

Decided Jan. 27, 1964

Appeal from the United States District Court for the Eastern District of South Carolina, at Charleston; J. Robert Martin, Jr., District Judge.

Before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges, sitting en banc.

PER CURIAM.

This is an appeal by public school officials of Charleston, South Carolina, from an order of the District Court, passed on August 22, 1963, requiring them to admit and enroll as students for the school year beginning September, 1963, eleven Negro children, plaintiffs below. The court directed the appellants to admit these children to the schools where white children residing in the same school zones as the plaintiffs would be permitted to attend. The order further enjoined the School Board not to operate its schools on a racially discriminatory basis or to exact "futile, burdensome or discriminatory administrative procedures" or to use tests on Negroes which are not uniformly applied in assigning students. The School Board was invited to formulate and submit for the court's approval a plan for complete desegregation of the school system.

The order was passed after appropriate and well-supported findings of fact and a complete exposition of the applicable law and decisions of the Supreme Court of the United States and of this court. Finding ourselves completely in accord, we adopt the District Court's opinion as our own. 226 F.Supp. 819.

Affirmed.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9216

MILLICENT F. BROWN, a minor, by J. ARTHUR BROWN, her father and next friend; et al., *Plaintiffs-Appellees*,

versus

SCHOOL DISTRICT No. 20, Charleston, South Carolina, THOMAS A. CARLEE, SUPERINTENDENT and members of the School Board, *Defendants*,

and

MARK ALLEN, BARBARA BELLOWS, GEORGE BELLOWS, JULIA JEANNE CANFIELD, ELIZABETH S. STACK and WILLIAM F. STACK by their respective fathers, *Intervenors-Appellants*.

ORDER

The Court having heretofore on January 27, 1964 entered its judgment and filed an opinion in the above entitled case and petitions for rehearing having been filed on February 18, 1964 by the intervenor appellants and on February 21, 1964 by the defendants:

Now, Therefore, upon consideration of the petitions for rehearing,

It Is Ordered that the petitions for rehearing be, and the same hereby are, denied.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

HERBERT S. BOREMAN,
United States Circuit Judge.

ALBERT V. BRYAN,
United States Circuit Judge.

J. SPENCER BELL,
United States Circuit Judge.

A true copy.

Teste:

Margaret S. Davis, *Clerk*,
U. S. Court of Appeals for the Fourth Circuit.

By Margaret L. Davis,
Deputy Clerk.

Filed: March 12th 1964. Margaret S. Davis, Clerk

IN THE

Supreme Court of the United States

1208

IN THE

Supreme Court of the United States

October Term, 1963

No. 1298

MARK ALLEN, ET AL. *Petitioners,*

versus

MILLICENT F. BROWN, ET AL. *Respondents.*

STATEMENT OF NON-PETITIONING SCHOOL DISTRICT PARTIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The question presented by the petition of the intervenors is one of importance, which should be determined by the Court. Therefore, the Board joins in the request that the Court issue a writ bringing the record before it for final decision.

SINKLER, GIBBS & SIMONS

A. T. GRAYDON

DAVID W. ROBINSON

Attorneys for SCHOOL DISTRICT NO. 20, CHARLESTON, SOUTH CAROLINA, a public body corporate, and CHARLES A. BROWN, Chairman of SCHOOL DISTRICT NO. 20, CHARLESTON, SOUTH CAROLINA, and THOMAS A. CARRERE, Superintendent, LAWRENCE O'HEAR STONEY, LEONARD A. MACKEY, JOHN T. WELCH, MRS. EDWIN A. PEARLSTINE, MRS. ALLAN MOORE, JR., DR. JOHN C. HAWK, JR., members, BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 20, CHARLESTON, SOUTH CAROLINA